IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 52 OF 2000

Shri Govind Anant Goltekar,
s/o late Anant Goltekar,
major age, married, agriculturist,
resident of Sodiem, Siolim,
Bardez-Goa.(since deceased) by
legal representatives:

(1) Shanu Govind Goltekar alias
Hemanoi Shankar Gaokar,
daughter of late Govind
Goltekar, wife of Shri
Shankar, Gaokar, aged 51
years, housewife;

(2) Shri Shankar Ganesh Gaokar,
son of Ganesh Gaokar,
aged 58 years, married,
retired;

Both residents of Shirgao,
Asnora, Bicholim-Goa.

(3) Pushpa Govind Goltekar
alias Pushpa Datta Pednekar,
daughter of Govind Goltekar,
wife of Datta Pednekar, aged
48 ears, housewife;

(4) Shri Datta Sagun Pednekar,
son of Sagun Pednekar, aged
53 years, married,
agriculturist,

Both residents of Saligao,
Bardez-Goa.

(5) Suhasini Govind Goltekar
alias Vandana Vithal Mhamal,
daughter of Govind Goltekar,
wife of Vithal Mhamal, major
age, housewife;

(6) Shri Vithal Mhamal,
major age, married, mason;

Both residents of Mandrem,
Pernem-Goa.

(7) Surekha Govind Goltekar,
daughter of Govind Goltekar,
wife of Anand Madhu Amonkar,
major age, housewife;

(8) Shri Anand Madhu Amonkar,
son of Madhu Amonkar,
major age, married, private
employee;

Both residents of Sirsai,
Bardez-Goa.

(9) Miss Sudha Govind Goltekar,
daughter of Govind Goltekar,
unmarried, aged 35 years,
housework, resident of Sodiem,
Siolim, Bardez-Goa.

(10) Miss Vaijayanti Govind Goltekar,
daughter of Govind Goltekar,
aged 33 years, housework,
resident of Sodiem, Siolim,
Bardez-Goa.

(11) Shri Dattaguru Govind Goltekar,
son of Govind Goltekar,
aged 32 years, unmarried,
service, resident of Sodiem,
Siolim, Bardez-Goa.

(12)Shri Nirdosh Govind Goltekar,
son of late Govind Goltekar,
major age, unmarried,
businessman, resident of
Sodiem, Siolim, Bardez-Goa. ... Appellants

versus

Shri Dasharath Deoba Goltekar,
s/o late Deoba Goltekar,
major age, married, agriculturist,
residing at Sodiem, Siolim,
Bardez-Goa. ... Respondent

Mr. M. S. Sonak, Advocate for the Appellants.

Mr. Sudin Usgaonkar, Advocate for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 3RD MARCH, 2006.

JUDGMENT

This is plaintiff's Second Appeal arising from Civil Suit No.207/84. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

2. The plaintiff(since deceased) and now represented by his legal heirs had filed the said Civil Suit praying therein for permanent injunction to restrain the defendant from interfering with the possession of the plaintiff and also for mandatory injunction directing the defendant to remove the haystack put by the defendant in the suit property 'B'.

3. The subject matter of the suit were two properties namely, property 'A' known as "Cumbiocho Kundgo" having land registration no.37956 of Book No.97 and survey no.278/40. The defendant raised no dispute as regards this property and consequently the learned trial Court partly decreed the suit in respect of suit property 'A'.

4. The property 'B' according to the plaintiff was known as "Goulan" and had registration no.17 of Book B-45, page 76, and was surveyed under no.279/16 and was stated to have been purchased by the plaintiff by Sale Deed dated 11-3-1974 from its owners namely, Graciano Fernandes, Francisco Fernandes and his wife Anatil Fernandes and that after its purchase the plaintiff had constructed a stone compound wall around the same which

property was on lease with the plaintiff from the time of his father prior to its purchase and the plaintiff was in peaceful possession and enjoyment of the same as absolute owner thereof. The plaintiff had alleged that on or about May, 1984 the defendant with his brutal force had demolished a part of the compound wall of suit property 'B' and dumped dry hay in it in the form of a haystack with a view to annoy and insult the plaintiff and that the defendant had no right or interest whatsoever in any of the suit properties.

5. The defendant had contested the suit but only in respect of property 'B'(suit property). The defendant took threefold pleas. First, that what the plaintiff purchased by Sale Deed dated 11-3-1974 is a plot admeasuring 66 sq. metres being part of survey no.279/3 and shown by the defendant by letters A, B and C on the plan annexed(Exh.DW1/D). Second, the sellers of the plaintiff namely, the said Graciano Fernandes and two others had no right, title or interest in the said property surveyed under no.279/16 and the sale Deed was a fraud played on the defendant and was, therefore, null and void. Third, the defendant was the owner in enjoyment of the suit property

surveyed under no.279/16, the same forming part of property known as "Toloiavoilem Bata" or "Sodiem Bata" having land registration no.32885 of folio 140 of Book B 84, the same having been purchased by the father of the defendant from the parents of the plaintiff by Sale Deed dated 26-2-1940 and inscribed in the name of defendant's father under number 30531 at folio 102 of Book G 35. In other words the defendant pleaded that the suit property surveyed under no.279/16 was included in the property purchased by Deed dated 26-2-1940. The defendant stated that the suit property surveyed under no.279/16 was wrongly recorded in the name of Graciano Fernandes which the defendant came to know for the first time after getting the plaint read and that it was wrongly surveyed as property having name "Goulan" in the survey records. Although the defendant stated that the suit property surveyed under no.279/16 was part of property purchased by Deed dated 26-2-1940 the defendant did not state about the other survey numbers which also formed part of the property purchased by Deed dated 26-2-1940 and which is according to the defendant known as "Toloiavoilem Bata" or "Sodiem Bata".

6. The plaintiff examined himself in support of his case and produced the said sale Deed dated 11-3-1974(Exh.PW1/D), form nos.I and XIV showing the name of Graciano Luciano Fernandes at Exh. PW1/E and form nos.I and XIV having his own name(Exh.PW1/F) after the said form nos.I and XIV was changed in his name after the purchase of the property. A plan of S.No. 279/16 was also produced. The plaintiff examined three witnesses to support his case. On the other hand, the defendant examined himself and two more witnesses and produced the certificate of description in support of his plea that the sellers of the plaintiff had no title in them and also produced the description of 32855 to prove his own title to the suit property as part of the said property described under no.32855 (Exh.DW1/A colly.)

7. The learned trial Court observed that although the plaintiff had relied upon the Sale Deed(Exh.PW1/D), how much area was sold to the plaintiff was not mentioned in the said Sale Deed which was very material to decide the dispute and that the boundaries of the suit property did not tally with the boundaries of the suit property. The learned trial Court also observed that

the plaintiff had not disclosed that by the said Sale Deed the plaintiff had purchased the plot of specific measurements and though the plaintiff had produced form nos.I and XIV it showed an area of 1.02 hectares and yet the same was not specifically described in the plaint. The learned first appellate Court instead of correcting these errors, also observed that there was discrepancy in the area claimed as well as to the identity of the plot and since the title of his predecessor was in dispute it was incumbent on the plaintiff to establish that his predecessor had title to part with the suit property apart from producing the Sale Deed between the said Santana and himself and the said Santana was not examined nor any document to show the right of the said Santana was produced on record to show the inscription, description, etc. The learned first appellate Court also observed that the plaintiff had not spelt out the boundaries or even the area of the suit property in his pleadings nor relied upon any documents of inscription, description nor any record except the Sale Deed which would have been material to establish his right to the suit property no.279/16 particularly when the defendant had raised serious disputes about the ownership of the suit plot.

The learned first appellate Court, therefore, proceeded to dismiss the appeal filed by the plaintiff.

8. This second appeal was admitted on 5-10-2000 on four substantial questions of law amongst which question (A) read as follows:-

> (A) Whether the impugned Judgment contains findings which are totally perverse for the following reasons:-
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> (i) The Judgment proceeds on the basis that the suit property 'B' has not been properly identified by the appellant(plaintiff), when in fact, the plaint, documents and the evidence on record, indicates the survey number, the land registration number and the area of the suit property 'B';
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> (ii) The Judgmnent of the trial Court records that the suit property 'B' admeasures 1.02 hectares as per the survey records, though this fact has not been stated in the plaint. In fact, the survey record mentions the area as about 200 sq. metres only and the said area has also been mentioned in the Sale Deed

on the basis of which the appellant claims title to the suit property 'B'. The findings in this regard, are therefore, completely perverse.

9. Mr. M. S. Sonak, the learned Counsel on behalf of the appellant/plaintiff has submitted that the plaintiff had produced the Sale Deed at Exh.PW1/D which showed the property purchased by the plaintiff along with the schedule and the said schedule gives not only the name of the property but also its registration number, matriz number, area as 200 sq. metres approximately survey no.279/16 and the boundaries as well. Mr. Sonak submits that both the Courts below did not at all consider the Sale Deed of the plaintiff Exh.PW1/D. Mr. Sonak submits that in the light of the said Sale Deed, the onus was on the defendant to prove that the suit property was part of the property purchased by the father of the defendant by Sale Deed dated 26-2-1940 and that the witnesses examined by the plaintiff had substantially supported the case of the plaintiff. Mr. Sonak submits that since the defendant came with a specific plea it was for the defendant to prove the same. Mr. Sonak has submitted that there were bound to be discrepancies in the oral evidence produced on behalf of the plaintiff but both the Courts below proceeded to rely on inadmissible

evidence and that again would be the substantial question of law which this Court could decide.

10. On the other hand, Mr. Sudin Usgaonkar, the learned Counsel on behalf of the defendant submitted that the burden was on the plaintiff to prove his case and the defendant was not required to prove anything more. Mr. Usgaonkar submits that the plaintiff had to prove that Graciano had a title to the said property. In other words, it is the contention of learned Counsel Mr. Usgaonkar that the plaintiff had to prove as to how Graciano had acquired title to the suit property which the plaintiff had failed to prove and on his failure the suit had necessarily to be dismissed.

11. Admittedly, the evidence of the plaintiff(PW1) was far from satisfactory but the plaintiff had produced formidable documents, if I may use that expression namely, the said Sale Deed dated 11-3-1974 (Exh.PW1/D) by which he had purchased the suit property from Graciano Fernandes and two others. Likewise, the plaintiff had produced form no.I and XIV which showed the name of the said Graciano in the occupants column and after execution of the Sale Deed the name of the plaintiff in form no. I and XIV was shown. Plaintiff's suit was for injunction simpliciter as can be seen from para 21(a) of the plaint in order to restrain the

defendant from interfering with the plaintiff's possession of the suit properties and in case the plaintiff had succeeded in proving possession, the suit had to be decreed as regards the suit property as well.

12. There was no dispute at all regarding the identity of the suit property surveyed under no.279/16. The plaintiff might have not given all the details as per Sale Deed but had produced the Sale Deed which showed all details, which both the Courts below chose to overlook. The plaintiff had claimed a specific property namely, the property surveyed under no.279/16. The plaintiff's Sale Deed(Exh.PW1/D) showed its area and its boundaries, including its land registration number and matriz number. The boundaries mentioned showed that it was bounded on the East by the property of Thomas Fernandes and the temple, on the West by the paddy field of Francisco Xavier Fernandes, on the North by the property of Francisco Xavier Fernandes and Toly of Communidade and on the South by the properties of Babusso Naik and Arjun Naik. There was no dispute as regards the actual boundaries of the suit property in the course of the trial, as well. It was admitted by the defendants that the suit property was presently bounded on the East by property surveyed under No.279/3(where admittedly there is a mantap), on the West by paddy field of Lily Fernandes and on the South by the property of Vasant Ravlu Goltekar(survey

no.279/20). It was admitted by the defendant that the property surveyed under no.279/3 belonged to the plaintiff as well as to the defendant and many others. Although the defendant stated that on the North of the suit property there was the property of the plaintiff which according to the defendant was marked by letters A B and C in fact the said portion is not to the North of the suit property surveyed under no.279/16 but to the eastern side of the suit property, as can be seen from defendant's plan DW1/D. When the plaintiff had specifically stated in terms of the Sale Deed produced by him that he had purchased a definite area with a definite survey number, I fail to understand how the defendant could take a plea that the plaintiff had purchased some other portion situated at a different place and that too with a less area and identified by him by letters A B C on Exh.DW1/D. Such a plea appears to me to be completely absurd. The defendant in his evidence had stated that the property purchased by his father by Sale Deed dated 26-2-1940 having registration no.32885 comprised of two survey nos. namely, 279/3 and 279/16 and if that is the case one fails to understand as to how the father of the plaintiff could sell a portion which was a part of the property of the plaintiff, the defendant and many others. In fact the defendant in his written statement did not plead that S.No.279/3 also formed part of property purchased by his father by Deed dated 26-2-1940. The defendant had admitted that there was a

compound wall separating the suit property (279/16) from survey no.279/3 and the said wall was in existence for more than 50 years. The existence of this wall is a strong indication which suggested that the suit property surveyed under no.279/16 was distinct and separate from the property surveyed under no.279/3 which admittedly belongs to the plaintiff as well as to the defendant and many others in which there are many houses belonging to different persons and also a mantap. As already stated, the evidence of the plaintiff might have been less than satisfactory but the plaintiff had produced not only the document of his title namely the Sale Deed Exh.PW1/D but also of his possession namely forms nos. I and XIV of survey no.279/16. If the plaintiff examined three witnesses to support his case who were on enemical terms with the defendant, the defendant examined two witnesses who were on enemical terms with the plaintiff. The plaintiff had discharged the burden of proving his case by the production of the said 3 documents. Defendant's contention is that the plaintiff had to prove that the sellers of the plaintiff had title. In my view this was not necessary at all. A registered Sale Deed carries a presumption of genuineness and the burden that it is not genuine is on the person who alleges it is not.(See AIR 1979 Allahabad 47). All that the defendant was able to demonstrate was that the suit property could not have land

registration no.17401 but that does not mean that Graciano and his brother Santana and his wife had no title to the property Goulan sold by Deed dated 11-3-1974. Once the plaintiff had produced the Sale Deed in support of his title it was for the defendant to show that the defendant had better or prior title to the same then the one acquired by the plaintiff by virtue of the said Sale Deed. Form No.I and XIV showed that the said Graciano was in possession of the suit property. Section 105 of the Land Revenue Code, 1968(Code, for short) deals with presumption of correctness of entries in the record of rights and register of mutations and provides that an entry in the record of rights and a certified entry in the register of mutation shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor. Form Nos.I to XIV(Exh.PW1/E) showed the name of the said Graciano Luciano Fernandes in the occupant's column and in terms of Section 105 of the Code it is the said Graciano who was to be presumed to have been in possession of the suit property. After purchase, the plaintiff got his name substituted in the name of Graciano Luciano Fernandes as can be seen from form nos.I to XIV-Exh.PW1/F. The plaintiff had the benefit of presumption in his favour first by virtue of the suit property being in the possession of the sellers of the plaintiff and thereafter of his own. A presumption has the effect of shifting the burden and the burden was

certainly on the defendant to displace the presumption arising from the entry of name of the plaintiff in the record of rights. I have already stated that the defendant admitted that there was a compound wall separating the suit property 'B' from survey no.279/3 and that is a strong indication to show that the suit property was distinct and separate from the common property surveyed under no.279/3. Even if the evidence of possession, produced by the plaintiff, is kept aside, the defendant has not been able to displace the presumption of possession which the plaintiff had by virtue of the documents produced by him. DW2/Raulu Goltekar has stated that the suit property surveyed under no.279/16 is bounded on the East by the property of Deoba(father of the defendant) bearing survey no.279/3 when in fact the same belongs not only to the plaintiff and the defendant but also to many others. As per him, the suit property surveyed under no.279/16 has on the North the property of Govind Goltekar when in fact what is on the Northern side of survey no.279/16 is the property surveyed under no.279/2 belonging to the said Lily Fernandes. According to him, property surveyed under no.279/3 adjoins the suit property on two sides namely, East and North, but the actual position is that it adjoins only on the Eastern side, on the Northern side being the said property surveyed under no.279/2 belonging to the said Lily Fernandes and the lake surveyed under

no.279/10. However, in cross examination DW2/Raulu Goltekar finally admitted that the property on the Northern as well as on the West belonged to the said Lily Fernandes. It is obvious that DW2/Raulu Goltekar does not know the exact location of the suit property surveyed under no.279/16. DW3/Subray Vernekar went to the extent of stating that even if he is taken to the site he would not be in a position to identify the Northern boundary of the suit property. He also stated that he does not know who is the owner of the property lying on the Eastern side. It is obvious that he too is not at all acquainted with the suit property.

13. Much reliance was placed on behalf of both the parties on the case of **A. Raghavamma and another** v. **A. Chenchamma and another** (AIR 1964 SC 136) which deals with burden of proof. The Supreme Court, speaking through three learned Judges in the said case, has stated that there is an essential distinction between burden of proof and onus of proof. Burden of proof lies on the person who has to prove a fact and it never shifts. But the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. I have already stated that the plaintiff had discharged the burden by producing the said 3 documents. The onus that suit property was part of property purchased by his father by Sale Deed

dated 26-2-1940 was clearly on the defendant. The defendant did produce Registration Certificate of the said property having No.32885 but the lake is on the West of that property and the suit property cannot be identified with any of the boundaries mentioned therein and this the defendant admitted by stating that the boundaries mentioned on the Registration Certificate are different from the boundaries of the suit property. The defendant thus had failed to discharge the onus which was on him to prove that the suit property alone or along with S.No.279/3 were parts of the property purchased on 26-2-1940. Even if the predecessors of the plaintiff had no title in themselves they had possession and based on the said possession they had sold the property in favour of the plaintiff and by virtue of the same the plaintiff had acquired both title and possession to the suit property. It is true that plaintiff was unable to prove he was tenant but that had no bearing on his claim. As already stated the suit was filed for injunction simpliciter based on possession. Independent of title, the defendant had failed to rebut the presumption of possession which the plaintiff had on the basis of form no.I and XIV. Both the Courts, therefore, ought to have decreed the suit in favour of the plaintiff based on the ground that the plaintiff was in possession of the suit property pursuant to the Sale Deed dated 11-3-1974. The appeal therefore succeeds. The substantial question of law is answered in favour of plaintiff. The orders of both the

Courts below as regards suit property are set aside. Consequently the Order dated 12-2-1985 by which the plaintiff was granted temporary injunction in his favour and which was upheld by the District Court by Order dated 17-11-1987 is hereby confirmed by way of permanent injunction with costs by the defendant throughout.

N. A. BRITTO, J.

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